



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 21, 2004

Ms. Mary Winston
Public Information Officer
Texas Savings and Loan Department
2601 North Lamar, Suite 201
Austin, Texas 78705

OR2004-3236

Dear Ms. Winston:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199679.

The Texas Savings and Loan Department (the "department") received two requests for certain information pertaining to Request for Proposals ("RFP") No. 450-4-3-P. Although you generally defer to the interested third parties who may have a proprietary interest in some of the requested information to raise arguments for withholding that information, you claim that such information is excepted from disclosure pursuant to sections 552.101 and 552.110 of the Government Code. Pursuant to section 552.305(d) of the Government Code, the department notified nine interested third parties, Financial Strategies, Experior Assessments ("Experior"), PSI Examination Services ("PSI"), LaserGrade Computer Testing, Inc. ("LaserGrade"), Prometric, Inc. ("Prometric"), CASTLE Worldwide, Inc. ("Castle"), Synergistx/Executrain ("Synergistx"), Pearson VUE, ("Pearson"), and Promissor, Inc. ("Promissor"), of the department's receipt of the requests and of each company's right to submit arguments to us as to why any portion of the submitted information relating to each company should not be released to the requestors. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances). We have considered the exceptions you claim and the arguments submitted to us by Prometric, Castle, Pearson, Promissor, and Experior and have reviewed the submitted information.

Initially, we note that the department did not submit to us for review any other portion of the requested information, other than the bid proposals submitted to the department by each company in response to the RFP. We, therefore, presume that the department has already

provided the requestors with the remaining requested information to the extent that it exists. If not, then the department must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). To date, we have not received comments from Financial Strategies, PSI, LaserGrade, or Synergistx explaining why any portion of the submitted information relating to each company should not be released to the requestors. Thus, we have no basis to conclude that the release of any portion of the submitted information relating to these companies would implicate their proprietary interests. *See, e.g.,* Gov't Code § 552.110(a), (b); *see also* Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the department may not withhold any portion of the submitted information pertaining to Financial Strategies, PSI, LaserGrade, or Synergistx on the basis of any proprietary interest that each company may have in the information.

We next address Prometric's, Castle's, Pearson's, Promissor's, and Experior's assertions that information contained in each company's respective proposal is subject to non-disclosure agreements and other precautions against public access. In this regard, we note that information is not confidential under the Act simply because the party submitting the information to a governmental body anticipates or requests that it be kept confidential. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). In other words, a governmental body cannot, through an agreement or contract, overrule or repeal provisions of the Act. *See* Attorney General Opinion JM-672 (1987); *see also* Open Records Decision Nos. 541 at 3 (1990) ("[T]he obligations of a governmental body under [the predecessor to the Act] cannot be compromised simply by its decision to enter into a contract."), 203 at 1 (1978) (mere expectation of confidentiality by person supplying information does not satisfy requirements of statutory predecessor to Gov't Code § 552.110). Consequently, unless information contained in each of these companies' respective proposals is encompassed by an exception to disclosure, the information must be released to the requestors, notwithstanding any expectation or agreement to the contrary.

We now address Prometric's, Castle's, Pearson's, Promissor's, and Experior's claim that certain information contained within each company's respective proposal is excepted from disclosure pursuant to section 552.110 of the Government Code. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by

statute or judicial decision,” and (2) “commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.” Gov’t Code § 552.110(a)-(b).

The Texas Supreme Court has adopted the definition of a “trade secret” from section 757 of the Restatement of Torts, which holds a “trade secret” to be

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958), *cert. denied*, 358 U.S. 898 (1958). If a governmental body takes no position on the application of the “trade secrets” component of section 552.110 to the information at issue, this office will accept a private person’s claim for exception as valid under that component if that person establishes a *prima facie* case for the exception and no one submits an argument that rebuts the claim as a matter of law.¹ *See Open Records Decision No. 552 at 5* (1990). We cannot conclude, however, that section 552.110(a) is applicable, unless it has been shown that the information at issue meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret

¹ The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and other involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Open Records Decision Nos. 319 at 2* (1982), *306 at 2* (1982), *255 at 2* (1980).

claim under section 552.110(a). *See* Open Records Decision No. 402 (1983) (addressing statutory predecessor).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See also* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm).

Based on our review of each of the companies' respective arguments and the information at issue, we find that Prometric, Castle, Promissor, and Experior have presented *prima facie* cases that parts of each company's proposal constitute trade secrets for purposes of section 552.110(a). We have received no arguments that rebut these companies' trade secret claims as a matter of law. Accordingly, we conclude that the portions of each of these companies' proposals that we have marked must be withheld pursuant to section 552.110(a). However, as we further find that Prometric, Castle, Pearson, Promissor, and Experior have not demonstrated that any remaining portion of the information at issue in each of their respective proposals qualifies as a trade secret, or that the release of that information would be likely to cause each company substantial competitive harm, we also conclude that the department may not withhold any remaining portion of the information at issue in each of their respective proposals under section 552.110 of the Government Code. *See* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing).

We note that PSI's and Financial Strategies' proposals contain social security numbers. Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that another statute makes confidential. A social security number is confidential under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if a governmental body obtained or maintains the social security number under any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994). It is not apparent to this office that the social security numbers contained in PSI's and Financial Strategies' proposals are confidential under section 405(c)(2)(C)(viii)(I) of the federal law. The department has cited no law, and we are aware of no law, enacted on or after October 1, 1990 that requires or authorizes it to obtain or maintain a social security number. Thus, we have no basis for concluding that the social security numbers in PSI's and Financial Strategies' proposals were obtained or are maintained under such a law and are, therefore, confidential under federal law. We caution the department, however, that chapter 552 of the Government Code imposes criminal

penalties for the release of confidential information. *See* Gov't Code §§ 552.007, .352. Therefore, prior to releasing these social security numbers, the department should ensure that they were not obtained and are not maintained by the department under any provision of law enacted on or after October 1, 1990.

In addition, we note that portions of LaserGrade's, PSI's, Castle's, Promissor's, and Experiore's proposals are copyrighted. A governmental body must allow inspection of copyrighted materials, unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information also must comply with the applicable copyright law, however, and is not required to furnish copies of copyrighted information. *See id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making such copies, the member of the public assumes the duty of compliance with the applicable copyright law and the risk of a copyright infringement suit.² *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, the department must withhold the portions of Prometric's, Castle's, Promissor's, and Experiore's proposals that we have marked pursuant to section 552.110(a) of the Government Code. The department may be required to withhold the social security numbers contained within PSI's and Financial Strategies' proposals pursuant to section 552.101 of the Government Code in conjunction with section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. The department must release the remaining submitted information to the requestors. However, in doing so, the department must comply with the applicable copyright law with respect to the copyrighted portions of LaserGrade's, PSI's, Castle's, Promissor's, and Experiore's proposals.

Finally, you request that we issue the department a previous determination that would allow it to withhold commercial or financial information obtained by the department during a state bid process in response to future requests for such information without the necessity of having to seek a decision from us with regard to such requested information. We decline to issue the department such a previous determination at this time.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full

² As our ruling is dispositive, we need not address any remaining arguments.

benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 199679

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